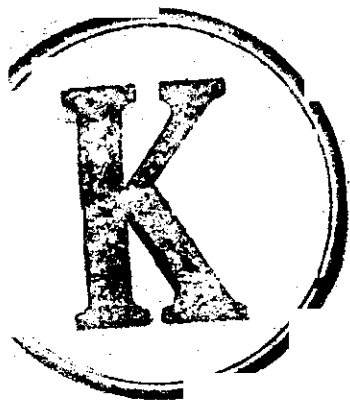




1943

File No. Dist. Police II

43
Legal Department

B BRANCH

Subject:-

Rules and Notifications

under the

Bombay District Police

Act 1890

P/ 6/ 8

File No. Dist. Police II /43

Gen. 194 e.

110 B

Office of the R.L.A.

The requisite draft rule to be issued by the Magistrate under clause (m) of sub-section (1) of section 39 of the Bombay District Police Act is sent herewith. R.L.A. agrees with the view taken by Secretary, R.D. in his note dated 9th January 1943 at p. 24 that the regulation of the movement of cattle, that is, the prohibition of entry of cattle into forest areas unless they are inoculated against reinderpest would be a measure in the interest of public convenience within the meaning of clause (m) of section 39(1).

Id/- P.N.M.

21/11

Remembrancer of Legal Affairs.

U.R. to R.D., No. 535 dated the 22nd January 1943.

MSR.
16/7.LD
17/7K.S.R.
17/7

Office of the R.L.A.

Section 26(1) (d) of the Indian Forest Act, 1927, penalises any person who in a reserved forest pastures cattle. Clause (a) of sub-section (2) of the same section however provides that nothing in that section shall be deemed to ~~not~~ prohibit any act done under any rule made by the Provincial Government. Section 32(1) of the Act gives power to the Provincial Government to make rules to regulate pasturing of cattle in protected forests. Clause (b) of rule 40 of the Bombay Forest Rules, 1942, which have been made inter alia under sections 26 and 32 provides that no person shall pasture cattle in a reserved or protected forest without obtaining a permit from a Revenue or Forest Officer and except in accordance with the conditions subject to which such permit has been granted, It is possible therefore to impose the condition of inoculation in the permits to be granted under the said rule for the next year for pasturing cattle in a reserved or protected forest.

Id/- P.N.M.

22/2

Remembrancer of Legal Affairs.

U.R. to R.D. No. 1395, dated the

23rd February 1943.

Office of the R.L.A.

The view taken by the R.L.A. of the Sind Government seems to be correct. In the absence of a provision similar to section 136 of the City of Bombay Police Act, 1902, it does not appear that it would be competent for the Magistrate to make any rules under section 39A of the Bombay District Police Act, 1890, prescribing fees for the grant of a license in respect of theatres and other places of public amusement (cf. R.L.A.'s opinion No. Canton.-II/11/30, dated 8th October 1930 para. 4). Rule 6 of the rules for licensing and controlling theatres and other places of public amusement which prescribes fees for licenses is therefore of doubtful validity, but since that rule has been in existence since 1915 and its validity has not been challenged so far it may continue in its present form. The Sind Government may be informed that section 39A of the Act has not been amended for the purpose.

2. It may be pointed out that when the rules in question were scrutinized by the R.L.A. in 1915 and 1939 the question whether section 39A gave power to prescribe fees in respect of licenses was not specifically considered and therefore it is not possible to say on what ground rule 6 was allowed to remain.

Id/- P.N.M.

29/7.

Remembrancer of Legal Affairs.

Office of the R.L.A.

It is presumed that so far as no licensee has raised the question of the validity of rule 6 nor objected to the payment of the license fees prescribed thereunder. If so, the licensees must be presumed to have acted on the view that the rule is a valid rule and paid the prescribed fees under a mistake of law. In England it has been held that the Court has power to relieve parties against mistakes of law as well as mistakes of fact. But under the Indian law if mistake is a pure mistake of law and such mistake of law results in the payment of by a person to another making it inequitable that the payee should retain the money, still it is no ground for relief.

(Mitra's Law of Limitation, 12th Edition, p. 570; see also R.L.A.'s opinion No. 12399, dated 29th November 1939). In the present case therefore the Courts will not grant any relief to the licensees in respect of the payments made by them without any objection. If, however, any licensee raises thereafter any objection to the payment of the fees and pays them under protest the Courts might consider that the fees were paid under duress (as the licensing officer would have refused to grant the license unless the fees were paid to him) and would order refund of the fees paid (see the passage in Leake on Contracts quoted in Raja of Ramnath vs. Secretary of State for India in Council, I.L.R. 52 Mad. 12 at p. 20). The licensees would, however, be entitled to refund only of the fees paid under protest and not of all the fees. In this view of the legal position the question of bringing in validating legislation can be deferred till objection is raised to the levy of the fees.

Id/-
30/9.

Remembrancer of Legal Affairs.

U.R. to H.D. (Poll), No. , dated the September 1943

Contains observations of the Judge, based evidently upon certain cases in Leake's contract; but that passage cannot be taken to have a general application to cases of void agreements or illegal provisions of law. The latter would still fall under Act. 62 of the Limitation Act, as ^{an} an/action for 'money had and received' "Where the tax has no legal existence, a suit will lie for the recovery of the same" (See p. 295 of Aiyangar: Law of Municipal Corporation; also Maskell v. Horner (1915) 3. K.B? 107. Please see also 38 Bom. 293, at p. 307, where the judgment says, "The money has been claimed without the shadow of a right, and the plaintiffs having paid under protest are entitled to recover the money, unless their claim is barred by limitation. ") And this is from Halsbury Vol. VII at p. 280 (para 390),- "A payment is not considered voluntary when made under threat of a penal action, or of an execution, even though no execution could lawfully issue, nor when illegally demanded and paid under colour of an Act of Parliament or of an office, or under an arbitrator's award which is ultra vires; nor when one party is in a position to dictate terms to the other. There may be "practical" as well as "actual legal" compulsion."

If R.L.A. agrees, reply may be para 2 of Mr. Dhurandhar's note as amended by a.s.

Id/-N.K.D.

2/10.

R.L.A.

On reconsideration, I think the view taken by D.S. is correct. The authorities show that a claim could be made for refund of an amount paid under an ultra vires clause or rule. I agree to the reply being amended as suggested.

Id/- P.N.M.

11/10.

Office of the R.L.A.

If a refund of the fee is claimed on the ground that the rule in question is ultra vires section 39A of the Bombay District Police Act, 1890, and the Court holds the rule in question to be ultra vires, it will order refund of the fee recovered, provided the claim for the refund has not become time-barred, under Article 62 of the Indian Limitation Act, 1908 (cf. pages 291-295 of Aiyangar's Law of Municipal Corporation and paragraph 6 of R.L.A.'s No. 2698, dated 16th May 1933). Government would be liable to refund all fees to all parties who have paid them within the limitation period of 3 years. Validating legislation would be necessary to legalise the levy of the fees, on the lines of section 4 (inserting new section 11-A) of Bombay Act XIV of 1935.

Id/- P.N.M.

13/10.

Remembrancer of Legal Affairs.

U.R. to H.D. (Poll.), No. 6861,

dated the 14th October 1943.

MSR.
16/7.